



Basic Labor Relations

Introduction for the New Practitioner

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COLLECTIVE BARGAINING IN THE FEDERAL SECTOR



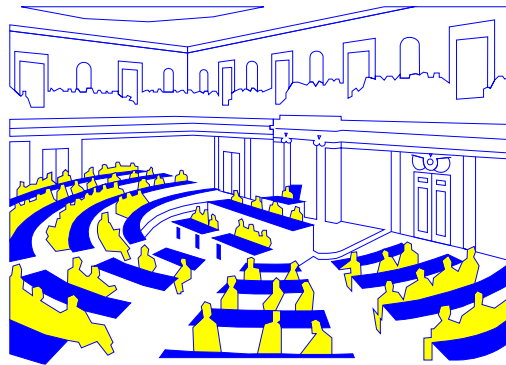
Module Objectives

With references, participants will...

- Describe the union's role as exclusive representative
- Describe the scope of bargaining
- Describe the process for determining the negotiability of union proposals
- Describe how negotiability disputes and negotiation impasses are resolved
- Define CBA and its importance in the collective bargaining process

THE LAW

“... labor organizations and collective bargaining in the civil service are in the public interest.”



5 USC 7101

The Statute

5 USC Chapter 71

- Employees have the right to organize, bargain, and participate through unions in decisions that affect them. (5 USC 7101)
- Management retains the right to manage (5 USC 7106)
- Union has the right to represent employees (5 USC 7114)



Federal Labor Relations Authority (FLRA)

- Three independent, bi-partisan, full time members
- Seven regional offices, HQ in DC
- Establishes policies & guidelines for Federal sector labor relations
- Program is driven by case law

5 CFR Chapter XIV



Some Terms of Art

- Collective bargaining
- Exclusive representative
- Level of exclusive recognition



Remember. . .

- In its dealings with management, the union speaks for ALL bargaining unit employees (union members and nonmembers alike)
- The union is a political organization that relies heavily on its membership for loyalty and support

Union's Right to Collective Bargaining

- 5 U.S.C. § 7114(a)(1)

A labor organization which has been accorded exclusive representation is the exclusive representative of the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering all employees in the unit.

Collective Bargaining Definition

- 5 U.S.C. § 7103 (a) (12)

“...to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached,...”

Good Faith Bargaining

- It is an unfair labor practice for an agency or union to “refuse to consult or negotiate in good faith.”
--5 U.S.C. § 7116(a)(5) or § 7116(b)(5).
- Determination is based on the totality of circumstances

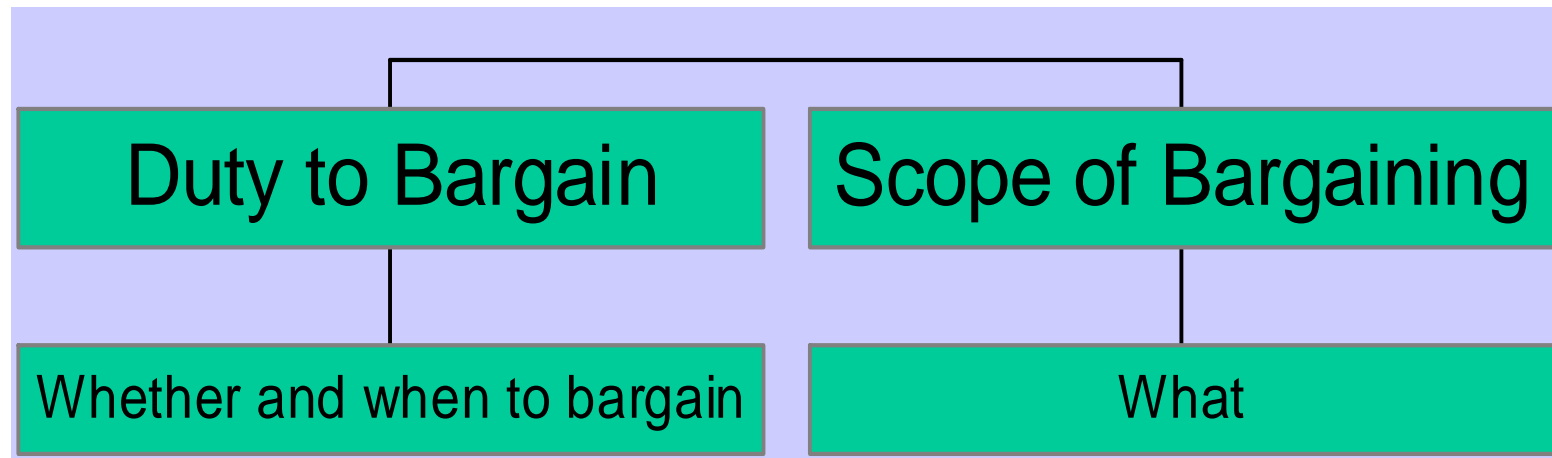


Good Faith Bargaining (cont)

- An intent to reach agreement
- Representatives prepared to negotiate and bind the parties upon agreement
- Meeting at reasonable times and places
- Providing requested data to the union
- Executing written agreement on request

(5 USC 7114(b))

Two aspects of collective bargaining



Duty to Bargain

Whether and When to Bargain

Duty to Bargain: When Does It Arise?

- Term negotiations
- Mid-term proposals over subjects not already bargained
- Proposed changes in conditions of employment
 - Change to a past practice



Term Negotiations

- Upon the expiration of a collective bargaining agreement, either party may seek to renegotiate its terms, and the parties have an obligation to engage in such negotiations upon request.
- If neither party seeks to renegotiate, then the mandatory terms of the agreement continue in effect, and the parties may rely on and enforce such provisions.
- Permissive terms of an expired contract remain in effect as well, but may be unilaterally terminated by either party upon proper notice.

Mid-Term Bargaining

- Management determines changes
 - Notify union
 - Bargain, if requested and as appropriate
 - *Bargain to completion*
 - Implement change
- Union can initiate Mid-Term bargaining on matters not covered by the contract



Proposed Changes In Conditions of Employment

- At any time, prior to making a change in a policy or practice concerning unit employees' conditions of employment, an agency is required to provide the union with notice and an opportunity to bargain over those aspects of the change that are within the duty to bargain
- The extent to which an agency is required to bargain over the change depends on the nature of the change
 - Actual decision or substance if not involving the exercise of a management right
 - The impact and implementation of the decision if involving the exercise of a management right

What is a Change?

- The determination as to whether a change in conditions of employment has occurred involves a case-by-case analysis and an inquiry into the facts and circumstances regarding the agency's conduct and employees' conditions of employment.

--SSA, Office of Hearings & Appeals, Montgomery, Ala., 60 FLRA 549 (2005); 92 Bomb Wing, Fairchild Air Force Base, Spokane, Wash., 50 FLRA 701 (1995); U.S. INS, Houston Dist., Houston, Tex., 50 FLRA 140 (1995).

Conditions of Employment Definition

- 5 U.S.C. § 7103 (a)(14)

Personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term shall not include policies, practices, and matters -

- Relating to political activities
- Relating to classification of any position; or
- Specifically provided for by Federal statute

(see Antilles Consolid. Educ. Ass'n, 22 FLRA 235 (1986))

Past Practice

- Pertains to condition of employment (e.g., CDs at employee workstations)
- Unwritten
- Consistently practiced over extended period of time
- Known about and accepted by both parties

☒ *Note: Change in practice triggers bargaining obligation*

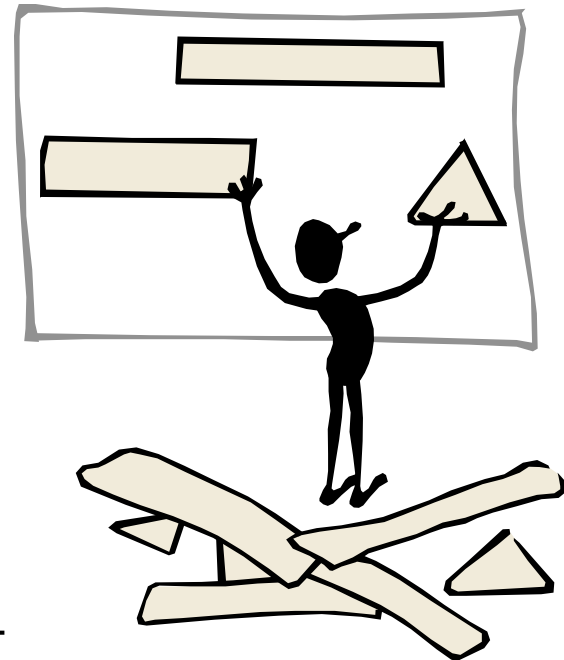
Past Practice (cont)

- To be binding, must meet all criteria and be consistent with law and regulation
- May not be changed without negotiating with the union
- If illegal practice, must negotiate impact and implementation of stopping practice
- Enforceable through arbitration
- May be used to establish agreement on matters not specifically covered by the contract

Past Practice (cont)

May be changed:

- If negotiate change
- If illegal



If contrary to contract,
past practice prevails

The *De Minimis* Test

- Unless the facts establish that the impact on bargaining unit employees is more than *de minimis*, no duty to bargain.
- The Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change evident at the time the change was proposed and implemented.

--*U.S. Dep't of the Treasury, IRS*, 56 FLRA 906 (2000); *GSA, Reg. 9, S.F., Cal.*, 52 FLRA 1107 (1997).

Examples of More Than *De Minimis* Changes

- Change in work hours that resulted in loss of overtime opportunities

--See *U.S. Customs Serv., S.W. Region, El Paso, Tex.*, 44 FLRA 1128 (1992).

- Implementation of VSIP program that would affect future career and retirement plan, and involved loss or benefit of \$25,000

--See *U.S. Dep't of the Air Force, Air Force Materiel Command*, 54 FLRA 914 (1998).

- Local office move that resulted in some computers and telephones being inoperable, computer files not accessible, and loss of quality storage cabinets

--See *U.S. Dep't of the Treasury, INS*, 56 FLRA 906 (2000).

Examples of *De Minimis* Changes

- Reduction in reserved parking spaces where employees had no problem securing alternate parking

--SSA, *Office of Hearings & Appeals, Charleston, S.C.*, 59 FLRA 646 (2004).

- Change resulting in increased workload where employees were not assigned new duties or required to perform duties not previously required and agency took measures to manage the additional workload

--U.S. DHS, *Border & Transp. Sec. Directorate, U.S. Customs & Border Prot., Border Patrol, Tucson Sector, Tucson, Ariz.*, 60 FLRA 169 (2004).

Union Initiated Mid-term Bargaining

- Agencies are obligated to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters not “contained in or covered by” the existing agreement unless the union has waived its right to bargain about the subject matter.

--*U.S. Dep't of the Interior, Wash., D.C. & U.S. Geological Survey, Reston, Va.*, 56 FLRA 45 (2000); *see also U.S. INS, U.S. Border Patrol, Del Rio, Tex.*, 51 FLRA 768 (1996).

“Covered By” tests

- Prong 1: Is the subject matter of the change “expressly contained” in the collective bargaining agreement? If not, expressly encompassed . . .
- Prong 2: Is the subject matter of the change “inseparably bound up with,” and plainly an aspect of, a subject covered by the agreement?

(see U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla., 56 FLRA 809 (2000); U.S. Dep’t of HHS, SSA, Balt., Md., 47 FLRA 1004 (1993))

Did the Union Waive Its Right to Bargain?

- Parties may define limitations on their bargaining rights under the Statute – i.e., time limits for requesting bargaining

--Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio, 51 FLRA 1532 (1996).

- Was a matter “fully discussed and consciously explored during negotiations” and whether the union “consciously yielded or otherwise clearly and unmistakably waived its interest in the matter.”

--See U.S. Dep't of the Interior, Wash., D.C. and U.S. Geological Survey, Reston, Va., 56 FLRA 45 (2000); see also U.S. Dep't of Treasury, INS, 56 FLRA 906 (2000).

What Must an Agency Do When it Proposes a Change in Conditions of Employment?

- Provide Union reasonable notice and opportunity to request bargaining
- If the union requests bargaining, respond
- Bargain to the extent required by the Statute
- Generally, maintain the *status quo* until the bargaining process is completed
- Cooperate with Federal Service Impasses Panel, if requested by union, prior to implementation

What Both Parties Need to Ask When a Change is Proposed

- Is there a “change?”
- Is the impact on conditions of employment *de minimis*?
- Is the proposed change “covered by the contract?”
- Did the union waive its right to bargain over the proposed change?
- Are any of the union’s proposals negotiable?

Implementing the Change

- An agency may implement a change if *all* proposals on the table at the time of implementation are non-negotiable and it has otherwise bargained in good faith
- The agency must, however, respond to the union's request to bargain over the proposals
- If the agency chooses to implement under these circumstances, then it acts at its peril. If *any* proposals are determined to be negotiable, then the agency has committed a ULP

Scope of Bargaining

What

Scope of Bargaining

- **Prohibited subjects:** 5 U.S.C. § 7106(a) establishes management rights under the Statute.
- **Permissive subjects :** 5 U.S.C. § 7106(b)(1) establishes permissive subjects of bargaining
- **Mandatory subjects:** 5 U.S.C. § 7106(b)(2) and (3) establish mandatory subjects of bargaining

Note: 5 U.S.C. § 7117(a) establishes that management is not obligated to bargain over matters inconsistent with law.

Prohibited Subjects: Management Rights

5 U.S.C. § 7106(a)(1)

- Mission
- Budget
- Organization
- Number of employees
- Internal Security Practices

5 U.S.C. § 7106(a)(2)

- hire, assign, direct, layoff, retain, suspend, remove, reduce in grade or pay, discipline,
- assign work,
- make selections for hiring, and
- other action as necessary to carry out the mission during emergencies.

Prohibited Subjects: What to Negotiate

- Parties must bargain over procedures management officials will use in exercising authority in this section (7106(b)(2))



**Understand the difference
between substance of
management right and procedure**

- A procedure that does NOT directly interfere with the agency's exercise of a management right

Prohibited Subjects: What to Negotiate

- Parties must bargain over appropriate arrangements for employees adversely affected by exercise of management rights (7106(b)(3))
- In order to constitute an "appropriate arrangement," a proposal must mitigate the adverse affects flowing from the exercise of a management right, but cannot "excessively interfere" with its exercise

Permissive Subjects of Bargaining

- At the election of the agency, parties may bargain on the numbers, types, and grades of employees or positions; or on the technology, methods, and means of performing work (7106(b)(1))
- May cease bargaining at any time before reaching agreement

Prohibited Subjects of Bargaining

Includes proposals contrary to. . .

- ◆ Laws/statutes
- ◆ Government-wide rules/regs

Determining Negotiability

- Does the proposal conflict with a government-wide regulation?
- Does the proposal excessively interfere with a management right?
- Is the proposal an impact and implementation proposal?
- Is the proposal regarding an elective subject of bargaining? If so, do you wish to bargain on it?

UNION RIGHTS



5 USC 7114

OFFICIAL TIME

- ❄ **Union representatives only**
- ❄ **Unlimited for negotiations**
- ❄ **REQUIRED for FLRA business**
- ❄ **NONE for internal union business**
- ❄ **Any amount negotiable for other uses**



5 USC 7131

FURNISH INFORMATION

[5 USC 7114(b)(4)]

- **Upon request**
- **Not prohibited by law (Privacy Act)**
- **Data is normally maintained**
- **Reasonably available and necessary**
- **NOT management guidance, advice or training related to collective bargaining**
- **Free of charge**



Formal Discussion

"Any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general conditions of employment"

5 USC 7114(a)(2)(A)

"Weingarten" Right

[5 USC 7114(a)(2)(B)]

- Investigation
 - Questions asked
- Conducted by agency rep
 - Agency is Department of Defense
- Employee *reasonably believes* discipline could result; and
 - NOT based on *supervisor's* intent
- Employee REQUESTS representation



Administering the Collective Bargaining Agreement



CBA - What is it?

- Implementation of the local agreement
- Living by the agreement, day-to-day
- Identifying provisions that work well
- Identifying and resolving disputed provisions



CBA - Why is it important?

- Basis for sound and durable relationship
- Promotes efficient and effective dealings
- Helps in prevention of ULPs
- Source of information for future negotiations



Stakeholder Responsibilities

Supervisors/Managers

- Understand LMA
- Comply with LMA
- Monitor LMA effectiveness
- Address problems early
- Communicate

Union stewards

- Understand LMA
- Police management compliance
- Protect workers' rights
- Strengthen local union
- Make employee views known to mgt



Barriers to Effective CA

- ◆ Lack of understanding/awareness
- ◆ Lack of constituent buy-in
- ◆ Lack of trust & other relationship issues
- ◆ Unclear language
- ◆ Deliberate violations, reckless disregard
- ◆ Third party decisions



Effective Contract Administration

- ◆ Act in good faith - abide by the CBA
- ◆ Get constituent buy-in throughout negotiations
- ◆ Sign CBA in public ceremony
- ◆ Train users early, often, and jointly
- ◆ Continually evaluate CBA effectiveness
- ◆ Resolve disagreements promptly and locally
- ◆ Communicate often and openly

Types of Disagreements

- Interpretation
- Application
- Combined interpretation/application



Handling Disagreements to Avoid Disputes

- ◆ Act in good faith
- ◆ Promptly get the parties talking
- ◆ Treat each other's concerns as legitimate
- ◆ Use interest-based methods
- ◆ Listen, learn, communicate



Negotiated Grievance Procedure (NGP)

- **Exclusive procedure for unit employees**
 - Employees may represent themselves but union has right to be present during grievance proceedings
- **Five statutory exclusions**
 - Other exclusions as negotiated
 - NGP may cover EEO complaints, adverse action & RIF appeals - check the CBA
- **Leads to binding arbitration**

(5 USC 7121)

Handling Grievances

1. GET THE FACTS -

Who?

What?

When?





Where?

Why/how?



Handling Grievances

2. REVIEW FOR PROCEDURAL COMPLIANCE

-  The grievance is filed by a BU member or union rep;
-  Over a matter covered by the NGP;
-  In a timely manner;
-  At the appropriate level

Handling Grievances

3. CONSIDER THE MERITS

Is the grievant's claim supported by the facts and do the facts add up to a violation?



Handling Grievances

4. CONSIDER SETTLEMENT POSSIBILITIES

- Consider present and future impact on mission, organization, morale of grievant and other workers, and the collective bargaining relationship
- Offer solutions that are fair, reasonable, and consistent with law, regulation, and contract

ULPs GENERALLY

- ULPs are generally alleged as violations of 5 U.S.C. Section 7116.
 - 7116(a) describes management violation
 - 7116(b) describes union violations
- Other sections define other violations
 - 7114(a) (Formal Discussions)
 - 7114(b) (Provide Information)
 - 7117(a) (Duty to Bargain)



MOST COMMON ULPS



- ☐ **Unilateral Change in COE**
- ☐ **Contract Breach**
- ☐ **Failure to Negotiate I & I**
- ☐ **Refusal to Furnish Information**
- ☐ **Bypassing the Union**

5 USC 7116(a)(5)

The HR Advisor

- Strive to understand all sides
- Develop a tolerance for ambiguity
- Be an active listener
- Do and say things that are constructive
- Speak to be understood
- Follow through on your commitments

Handling Contract Interpretation Disputes

- ◆ Review related CBA provisions
- ◆ Review bargaining history/notes
- ◆ Review previous versions of CBA to track language evolution
- ◆ Review past practice



AND ... FINALLY!!!

- **QUESTIONS?????**